The doctor concluded by saying that the plaintiff should attend a spinal centre for proper rehabilitation so that his quality of life can be improved.

Mr. Shankar cited two cases when he submitted on the question of quantum. They are *Raja Mokhtar bin Raja Yaacob* v. *Public Trustee*[6] and *Mun Kum Chow* v. *Aikbee Sawmill Ltd.*[7]

These cases seem useful in the determination of the damages to be awarded. In the instant case, however, there are three aspects of the quantum that call for assessment, namely, the special damages, loss of amenities and loss of future earnings.

It is not seriously in dispute that the plaintiff was earning around $10 to $12 per day and based on 25 working days in a month at $12 a day it is worked out to about $300 per month. I would therefore accept this figure as the plaintiff's monthly earning at the time of the accident. Thus in so far as special damages is concerned I would allow based on $300 per month, a straight multiplier of x 12 x 8 = $28,800. And based on the same monthly loss of earning, taking into account that the plaintiff is now 34 years old, it seems reasonable that I allow a purchase of 16 years. I assess loss of future earnings at $39,000. As for the loss of amenities I hardly think *Raja Mokhtar's* case is a good comparison. Nevertheless it is illustrative of the amount the court may be disposed to assess in similar cases. Taking into account the plaintiff's social position in life and having regard to the sum awarded in the case of *Raja Mokhtar*, I am inclined to think that a sum of $60,000 under this head would represent a fair and reasonable compensation.

It only remains for the court to make some deduction against the sum awarded for general damages on account of the discharge against medical advice which the doctor said has significantly contributed to the development of the extensive bed sores and subsequent slow healing. In consideration it seems appropriate that a sum of $5,800 be deducted from the sum of $99,000 leaving a balance of $93,200. Added to the sum of $28,800 special damages the total damages awarded will be $122,000. I therefore enter judgment against the first, the second and the third defendants for a sum of $122,000 in the proportion of 40%, 40% and 20% respectively, and costs. In addition I also allow 3% interest on the special damages with effect from the date of the accident and 6% interest on the general damages with effect from the date of the service of the writ.

As between the defendants I give liberty to apply.

Judgment for the plaintiff.

Solicitors: *Khoo & Sidhu; Shearn Delamore & Co.; Nik Hussain, Ibrahim, Tan & Abdullah; Morris Edgar & Co.; Joginder Singh & Co.*

SOCIETE DES ETAINS DE BAYAS TUDJUH v. WOH HENG MINING KONGSI

[O.C.J. (Abdoolcader J.)
November 28, 1977, April 20 and May 24, 1978]
[Ipoh — Civil Suit No. 315 of 1977]

Practice and Procedure — Summary judgment — Application for — Defence and counterclaim — Triable issues — R.S.C. 1957, O. 14 rr. 1 & 4, O. 54 r. 22A — Moneylenders Ordinance 1951, s. 2.

In this case the plaintiffs claimed payment of the sum of $33,278.41 due on a permit to mine they executed in favour of the defendants over certain mining lands. The defendants counterclaimed for damages and for the return of the sums of $11,750 and $4,504.60 paid by them. The learned Senior Assistant Registrar granted conditional leave to the defendants to defend on their depositing the sum of $21,412.11 in court. The defendants appealed.

Held: (1) the intention of the rules was that the application for summary judgment should be made before a defence had been delivered in ordinary course. However, the plaintiff was not precluded from making it afterwards. In such an event, the onus was on the plaintiff to show why he did not apply sooner;

(2) if a defendant, though he admitted part of the plaintiff's claim, set up a defence to the residue and a counterclaim for a larger amount than the part of the plaintiff's claim admitted, he would be entitled to unconditional leave to defend as to the whole;

(3) Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court, or to make him liable in such a case to be put on terms of paying into court as a condition of leave to defend;

(4) where there was clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to trouble and expense of proving it, but the defendant set up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment on the claim with a stay of execution until the trial of a counterclaim.

Cases referred to:-

(1) *McLardy* v. *Slateum* (1890) 24 Q.B.D. 504.
(2) *Court* v. *Sheen* 7 T.L.R. 556.
(3) *Jacobs* v. *Booth's Distillery Co.* 85 L.T. 262, H.L.
(4) *Sheppards & Co.* v. *Wilkinson & Jarvis* (1889) 6 T.L.R. 13, C.A.
(5) *Fritz* v. *Hobson* (1880) 14 Ch. D. 542, 561.

CIVIL SUIT.

W.S.W. Davidson and *U. Harcharan Singh* for the plaintiffs.

J.R. Devadas for the defendants.

Abdoolcader J.: The plaintiffs instituted these proceedings against the defendants for payment of a monetary claim, as a result of a Permit to Mine they executed in favour of the defendants over certain mining lands, in the aggregate sum of $33,278.41 being (a) a sum of $23,848.11 alleged to be due and owing to them when mining operations ceased on April 30, 1977, (b) $7,480.30 for the supply of electricity to the mine in May, 1977, as a result of the defendants' failure to remove their equipment from the land, (c) $1,500 by way of indemnity in respect of a fine imposed on them for unlawful dumping, and (d) $450 being expenses incurred by them in the removal of some machinery from the mine hole.

The plaintiffs applied for summary judgment for this aggregate sum of $33,278.11 under Order 14 of the Rules of the High Court, 1957, and on November

9, 1977, the Senior Assistant Registrar granted conditional leave to the defendants to defend on their depositing in court within two weeks the sum of $21,412.11 being the amount of the plaintiffs' claim for $23,848.11 under (a) set out above less a sum of $2,436 which the plaintiffs admitted should have been credited to the defendants. I would add that counsel for the plaintiffs in his submission before the registrar also conceded that the defendants should have leave to defend for the contested sum of $500 in respect of the claim under (c) but apparently the registrar omitted to take this into consideration in making her order. The defendants then appealed to me in chambers against the order made by the registrar.

The writ in these proceedings was issued on July 8, 1977, and served on July 29 on the defendants who filed their defence and counterclaim on August 12 raising several points of defence and counterclaim, but the plaintiffs only took out their application for summary judgment for the full amount of their claim on August 16. In *McLardy* v. *Slateum*[1] the Divisional Court held that, though it was the intention of the rules that the application should be made before a defence had been delivered in ordinary course, the plaintiff was not precluded from making it afterwards, but that in such an event the onus is cast on the plaintiff of showing why he did not apply sooner. The plaintiffs in this case have not discharged this onus and indeed counsel appearing for them admitted this to be so.

The plaintiffs' General Manager swore the requisite statutory affidavit under Order 14 rule 1 in support of the application stating on oath that the facts set out in the Statement of Claim were within his own knowledge true, that the defendants were justly and truly indebted to the plaintiffs in the sum set out in the Statement of Claim and that he verily believed and was advised that there was no defence to this action. This was certainly not an honest affidavit as this same person then filed another affidavit, this time affirmed by him, on September 27, 1977, which presumably was the result of the defence and counterclaim delivered by the defendants. The defendants' Managing Partner swore an affidavit on October 19 in reply thereto setting out substantially the matters raised in the defence and counterclaim previously filed and delivered. The second affidavit of the plaintiffs' General Manager was a change in stance from the one he swore in support of the application for summary judgment and made some concessions and in particular admitted that a sum of $2,436 had in fact been received and had not been credited to the defendants, and casually concluded with the somewhat smug statement that he had been advised and verily believed that the defence of the defendants had no merit except to the extent indicated therein.

The defendants contended that they had paid a sum of $6,190.50 towards buffer stock contributions which would be repaid to the plaintiffs with dividends thereon of between $2,000 and $3,000 and that no allowance had been made for this, but in this regard while admitting this the plaintiffs contended the buffer stock contributions would only be redeemable in five years' time and could not be the subject-matter of a requisite set-off at this stage.

As to claim (b), the defendants stated they were not legally obliged to remove the equipment and denied therefore that they were liable for the amount claimed thereunder. They also averred with respect to claim (c) that the fine was to be borne by others as well as the defendants and that their share of the indemnity would be less than $1,000. As I have stated earlier, counsel for the plaintiffs agreed before the registrar that in this respect the defendants should have leave to defend for the contested sum of $500 but the registrar failed to consider this concession in making her order. The defendants also denied liability for claim (d) on the ground that the plaintiffs wrongfully removed their equipment from the land and they were accordingly not liable for the expenses incurred. The defendants also contended that there was tin ore left in the mine and that their share of 87% of the value thereof was substantial and would exceed the amount of the plaintiff's claim under (b) and (d).

The defendant also alleged that when the Permit to Mine was first granted there was a verbal agreement between them and the plaintiffs for valuable consideration that they would be permitted to work the land until the whole thereof had been worked out and that the Permit to Mine would be renewed yearly by the plaintiffs until this event occurred, and that they acted accordingly and expended substantial amounts on the land on the strength of this verbal agreement. The defendants therefore alleged a breach of this verbal agreement and that they had in consequence suffered loss and damage and counterclaimed for specific performance of this verbal agreement and damages for breach thereof. The plaintiffs denied this allegation and before the registrar submitted that the defendants were precluded from raising this contention by virtue of the provisions of section 92 of the Evidence Act, 1950. I could not see any validity in this contention as clearly proviso (b) and even (c) to section 92 could apply. This was clearly a triable issue depending of course on evidence to be adduced, and I could not see that it was in any way *ex facie* a frivolous contention wholly incapable of substantiation. I should perhaps refer in this connection to a categorical assertion by the plaintiffs' General Manager in the second affidavit affirmed by him that the plaintiffs received a letter dated May 30, 1977, from the defendants showing that the defendants agreed to the termination of the Permit to Mine. That letter which was exhibited in fact said nothing of the kind, and in his submission before the registrar counsel for the plaintiffs had to agree this was so, stating that that letter was not a formal admission but he tried to explain it by saying it indicated the attitude of mind of the defendants. The statement in the second affidavit I have referred to was clearly therefore a blatant exaggeration and untrue.

The defendants then raised the question of the loan of $50,000 they took from the plaintiffs against the security of the fourth buffer stock contribution and alleged that the plaintiffs unlawfully collected a sum of $11,750 as interest for the period between December 1974 and December 1976. They alleged that the plaintiffs were not licensed or registered moneylenders and that it was due to undue influence exercised by the plaintiffs over them arising from their relationship that the defendants agreed to pay interest

on the loan. Before me in chambers counsel for the defendants stated that the loan started as an interest-free loan, and counsel for the plaintiffs did not in any way controvert this statement. The defendants asked for a refund of this sum of $11,750 and in the alternative claimed that the interest was in any event excessive. The plaintiffs denied that this was a money-lending transaction within the ambit of the Moneylenders Ordinance, 1951 and averred that the interest charged was lawful and reasonable, that no undue influence was exercised and that the transaction was at arm's length. The plaintiffs sought to argue that they were not moneylenders for the purposes of this loan and that they came within exception (c) to the definition of 'moneylender' in section 2 of the Moneylenders Ordinance as being a person *bona fide* carrying on a business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.

However, the first question that arises in this context is whether or not the plaintiffs who are a limited company have power to lend money and whether this is stated in their Memorandum of Association. When I put this to counsel for the plaintiffs he could not say whether the plaintiffs had any such power. This point was obviously not considered at all nor any effort made to even look at the plaintiffs' Memorandum of Association to ascertain this. In the circumstances, I could find nothing questionable in the allegation raised in respect of the loan and again clearly a triable issue arose between the parties. On the issue of undue influence, I could see no reason why it was not open to the defendants to raise this issue, at least on the basis of the doctrine of inequality of bargaining power recently enunciated in several recent decisions in England, to be determined on the evidence to be adduced at the trial of this action.

The defendants further contended that they were not liable for electricity supplied to the mine between September and October, 1974, amounting to $4,504.60 which they alleged the plaintiffs wrongfully deducted from the refund of the buffer stock contributions. They accordingly claimed a set-off in respect of this sum as moneys had and received to their use. This was of course again denied by the plaintiffs but here again clearly in my view a triable issue arose on the point raised.

The defendants counterclaimed for specific performance of the verbal agreement I have referred to, general and special damages, an injunction and the return of the said sums of $11,750 and $4,504.60 and in the alternative, in respect of the former sum, relief against excessive interest. For the reasons I have adumbrated I found the counterclaim was certainly not made *mala fide*.

Before the registrar, counsel for the defendants submitted that monetarily the plaintiffs' claim should be reduced by about $11,000 and that at the most the plaintiffs were entitled to judgment for about $22,000. He submitted that against this the defendants had the amounts claimed in their counterclaim and that if any judgment were to be given for about $22,000, then execution thereon must be stayed. It would appear that the registrar accepted that there were triable issues on the several points raised by the defendants under claims (b), (c) and (d) but felt that the plaintiffs were entitled to judgment in respect of claim (a) less the sum of $2,436 which the plaintiffs admitted should have been credited to the defendants. She accordingly made the order which she did giving the defendants conditional leave to defend on their depositing in court within two weeks of her order the sum of $21,412.11.

If a defendant, though he admits part of the plaintiff's claim, sets up a defence to the residue and a counterclaim for a larger amount than the part of the plaintiff's claim admitted, he is entitled to unconditional leave to defend as to the whole (*Court* v. *Sheen*[2]). When a *bona fide* counterclaim is set up arising out of the subject-matter of the action and connected with the grounds of defence, unconditional leave to defend should be given, even where the defendant admits part of the plaintiff's claim, as in such circumstances such admission is only subject to the counterclaim which might turn out to be larger in amount (*Court* v. *Sheen* (*supra*)). Order 14 was not intended to shut out a defendant who could show that there was a triable issue applicable to the claim as a whole from laying his defence before the court, or to make him liable in such a case to be put on terms of paying into court as a condition of leave to defend (*Jacobs* v. *Booth's Distillery Co.*[3]). Where there is clearly no defence to the plaintiff's claim, so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff's claim, the order should not be for leave to defend but should be for judgment for the plaintiff on the claim with a stay of execution until the trial of the counterclaim (*Sheppards & Co.* v. *Wilkinson & Jarvis*[4]).

Counsel for the defendants submitted before me in chambers that there should either be unconditional leave to defend or judgment for the plaintiffs for the amount due after the necessary deductions with a stay of execution thereon. On a consideration of the matters presented in the defence and counterclaim and the affidavits filed on behalf of the parties, it appeared to me that the amount of the counterclaim would not be less than the plaintiffs' claim under (a) at least and indeed nothing to the contrary was either shown nor was this aspect even raised by counsel for the plaintiffs in the appeal before me in chambers. I did put this point specifically to counsel for the plaintiffs when this matter came up for further argument in open court, and all he was able to say was that he could neither confirm nor deny that the amount of the counterclaim would be less than the amount for which judgment was given for the plaintiffs in the order made by me in chambers. In the circumstances, as I found that there were indeed triable issues on the several points raised by the defendants, I was of the firm and considered view that the proper order was not that made by the registrar which was onerous but that an application of the provisions of Order 14 rule 4 would be the appropriate course to take and that there should be judgment for the plaintiffs in the sum of $21,412.11 (being claim (a) less the agreed deduction of $2.436) with a stay of execution thereon until after the trial of the action and counterclaim and that the defendants be given unconditional leave to defend in

respect of the balance of the plaintiffs' claim. I accordingly so ordered in allowing the appeal by the defendants on November 28, 1977, in chambers and setting aside the order made by the registrar and also awarded costs before the registrar to the plaintiffs but reserved the costs of the appeal before me in chambers.

I allowed an application for further argument in open court under Order 54 rule 22A entirely out of curiosity as to what further points could be taken on behalf of the plaintiffs apart from the arguments previously presented. On further argument heard on April 20, 1978, counsel for the plaintiffs said he did not dispute the judgment in their favour for $21,412.11 but were only complaining about the stay of execution granted in respect thereof. He then submitted that conditional leave to defend in respect of the balance should have been given but in answer to me agreed that this matter had never been raised previously and he then withdrew this contention. He agreed that the plaintiffs had not discharged the onus on them under the rule in *McLardy* v. *Slateum, supra,* and was also unable to say even at that stage whether there was any power in their Memorandum of Association for the plaintiffs to lend money and agreed that there was a triable issue on the moneylending question raised in respect of the loan made by the plaintiffs to the defendants.

Plaintiffs' counsel further agreed that on the matter raised by the defendants of an oral agreement to renew the Permit to Mine yearly there was a triable issue but added that the plaintiffs said this was rather shadowy, as he put it, whatever that was meant to convey. As I have said earlier I found nothing spectral about this issue which, of course, would have to be determined by evidence at the trial. He then submitted that mining consultants had said that the land had been worked out and referred me in this connection to the second paragraph of a copy of a letter dated May 25, 1976, from a firm of mining consultants to the plaintiffs which was exhibited to the second affidavit affirmed by the plaintiffs' General Manager, but when I asked him where in that paragraph it said so, he immediately withdrew his observation that the consultants had said that the land had been worked out and added that this letter did not expressly say so but only by implication. I could not find even any such necessary implication in the paragraph in question. He then agreed that there were triable issues raised in the defence and counterclaim and when I specifically asked him whether the amount of the counterclaim would be less than the amount for which I had given judgment for the plaintiffs, he was unable to say one way or the other. I would add that he further submitted that the order I made in chambers for a stay of execution until after the trial of the action and counterclaim should also include the words 'or until further order', but when I said that both parties were at liberty to apply to the court in the event of changing circumstances (as liberty to apply to the court is implied without its being expressly reserved: *Fritz* v. *Hobson*[5] at p. 561 per Fry J.), he indicated he was not pursuing that argument.

In the light of all these admissions by counsel for the plaintiffs on further argument in open court and as nothing new was raised, I was even more convinced than ever that the order I had made in chambers was the proper and correct one and that in the circumstances there was no justification whatsoever for reversing or varying my order. In the event, I confirmed the order I had made in chambers on November 28, 1977, and ordered costs of further argument to be paid by the plaintiffs to the defendants.

Order accordingly.

Solicitors: *Lewis & Co.; J.R. Devadas.*